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APPELLEE'S BRIEF

SUPREME COURT OF KENTUCKY

FORMERLY COURT OF APPEALS OF KENTUCKY

NO. 75-1023

STRUNK CONSTRUCTION
COMPANY, INC.,

APPELLANTS,

VS:

JAMES LEE STEWART and
J.D. MULLICAN, INC.,

APPELLEES,

APPEAL FROM PULASKI CIRCUIT COURT
HON. LAWRENCE S. HAIL, JUDGE

BRIEF FOR APPELLEE

J.D. MULLICAN, INC.

FILED

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ATTORNEYS FOR APPELLEE

J.D. MULLICAN, INC.

This is to certify that the within brief has been served upon the Appellant and Hon. Thomas E. Utley, Attorney For Appellant, at P.O. Drawer 30, Somerset, Kentucky 42501, and the Appellee, James Lee Stewart and Hon. John G. Prather, Jr., P.O. Box 106, Somerset, Kentucky 42501, Attorney for Appellee, James Lee Stewart, and Hon. Phillip K. Wicker (succeeding Hon. Lawrence S. Hail), the Trial Judge at Somerset, Kentucky 42501, Pursuant to RCA 1.250, this the 29th day of January, 1976.



ATTORNEY FOR APPELLEE,

J.D. MULLICAN, INC.

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STATEMENT OF QUESTION PRESENTED

1. Was the Appellant entitled to a directed verdict upon the claim of J.D. Mullican, Inc.?

(A) Kentucky recognizes the right of recovery for interference with the contractual rights of another.

(B) It is within the province of the jury to determine what is malicious or without justification.

(C) There was a conflict in the evidence as to why Strunk refused to allow Stewart to haul from its quarry.

COURT OF APPEALS OF KENTUCKY

No. 75-1023

STRUNK CONSTRUCTION
COMPANY, INC.,

APPELLANTS,

VS:

JAMES LEE STEWART and
J.D. MULLICAN, INC.,

APPELLEES,

BRIEF FOR THE APPELLEE
J.D. MULLICAN, INC.

MAY IT PLEASE THE COURT:

COUNTERSTATEMENT OF THE CASE

(A) STATEMENT OF PROCEEDINGS

The Appellee, J.D. Mullican, Inc., adopts the "Statement of Proceedings" as set forth in Appellant's Brief and will refer to the parties as "Stewart" for the Appellee James Lee Stewart; as "Mullican" for the Appellee J.D. Mullican, Inc.; as "Strunk" for the Appellant, Strunk Construction Company, Inc.; and as "Hinkle" for Hinkle Contracting Corporation, a defendant in the Court below. The transcript of the proceedings and evidence as prepared by the official reporters of the Pulaski Circuit Court will be referred to by the abbreviation "Tr." The record of the Pulaski Circuit Court as prepared by the Circuit Court will be referred to by the abbreviation "R."

The Appellee, J.D. Mullican, Inc., did not seek punitive damages and will respond only to the first question presented in Appellant's brief.

(B) STATEMENT OF FACTS

Mullican was the prime contractor for the construction of a large industrial plant at the time the dispute in this case arose. Its construction contract required Mullican to purchase large amounts of stone from commercial rock quarries. Pursuant to this requirement Mullican sought and obtained bids from both of the local quarries, Somerset Stone and Strunk, and was informed that both would provide stone F.O.B. the quarry and that Mullican could arrange for delivery to the construction site (Tr. P. 115, Q. 23-27). Acting upon this information, Mullican contracted with Stewart to haul the stone at a price of fifty (50) cents per ton (Tr. P. 33, Q. 22) and Stewart hauled from the quarry site of Somerset Stone without difficulty for a period of four (4) days (Tr. P. 34, Q. 26). After four (4) days Somerset Stone's supply was depleted (Tr. P. 35, W. 34), and Stewart thereupon began hauling stone from Strunk (Tr. P. 35, Q. 35). Stewart hauled from Strunk's quarry site for a period of three (3) days, ending on November 5, 1970, (Tr. P. 35, W. 42). On the night of November 5th, the President of Strunk ordered his local quarry superintendent to stop loading Stewart's trucks which were hauling stone to Mullican's construction site, and to require that any stone for that project be sold on an on-site delivered basis (Tr. P. 36, Q. 47). On the morning of November 6, 1970, Strunk refused to load

Stewart's trucks (Tr. P. 35, Q. 43) and Stewart at that time notified Mullican of Strunk's refusal (Tr. P. 68, Q. 5). Stone not being available from Somerset Stone, Mullican contacted Strunk as to terms (Tr. P. 109, Q. 30), and was told that stone would be sold to Mullican only upon an on-site delivered basis, for which Mullican would be charged sixty (60) cents per ton for hauling (Tr. P. 110, Q. 35). Strunk was aware that the construction season was rapidly drawing to a close and that Mullican's immediate need for stone was critical (Tr. P. 217, Q. 43-46). Mullican was forced to accept the terms offered. Strunk was also aware that Somerset Stone, the other local quarry, was unable to supply further orders, and that by refusing to load Stewart's trucks Strunk would receive a purchase order for the balance of the stone needed (Tr. P. 215, Q. 30). Upon Mullican's consenting to purchase stone delivered on site, truckers selected or obtained and paid by Strunk (Tr. P. 37, Q. 59) immediately resumed delivery (Tr. P. 190, Q. 111) and continued the delivery of stone until the project was completed. Upon cross-examination, Luther Hargis, office manager for Strunk, testified that he had worked for that company for more than three (3) years (Tr. P. 130, Q. 1) and that during that time he knew of no other instance where Strunk had refused to load a buyer's trucks (Tr. P. 130, Q. 2). As a consequence of Strunk's refusal to allow Stewart's trucks to haul stone pursuant to the contract between Stewart and Mullican, Mullican expended an additional three thousand thirty-six dollars and 39/100 (\$3,036.39) (Tr. P. 12), which sum Strunk paid to truckers that it selected (Tr. P. 84, Q. 15-16).

ARGUMENT

WAS THE APPELLANT ENTITLED TO A DIRECTED VERDICT UPON THE CLAIM OF J.D. MULLICAN, INC.?

(A) Kentucky recognizes the right of recovery for interference with the contractual rights of another.

The principal is well settled in Kentucky case law that malicious or unjustifiable interference with the rights of a party to a contract provides a remedy in tort for the injured party. Appellant has acknowledged this principal in his brief by citing Derby Road Building Co., Inc., v. Commonwealth of Kentucky, Department of Highways, Ky., 317 S.W. 2D 891 (1958). Other courts have also recognized the existence of this tort in Kentucky. In Brinkley & West, Inc., v. Foremost Insurance, Inc., 499 F 2D 934 (1974), the Fifth Circuit Court of Appeals cited Derby, supra, and stated that Kentucky law provides a cause of action against a party who interfered with a contractual relationship. Similarly, the Sixth Circuit Court of Appeals cited Derby and recognized this cause of action in the case of Davis H. Elliott Co., Inc., v. Carribean Utilities Co., Ltd., 513 F 2D 1176. There the court stated:

“In Kentucky, intentional interference with a known contractual relationship gives rise to an action in tort, if the interference is malicious or without justification.” (Supra, AT P. 1182).

All of the above cases spell out the elements of tortious interference: that the party to be charged had knowledge that a contract existed and that the interference be either malicious or

without justification. Therefore, under Kentucky law, Strunk is liable for damages inflicted upon Mullican and Stewart if Strunk interfered maliciously or without justification with their contractual relationship, knowing that such relationship existed.

The law does not state that Strunk is liable only if it acted illegally, but if it acted maliciously. "Malicious" means the doing of a wrongful act by one person against another intentionally or with evil intent without just cause or excuse or as the result of ill will," Jillson v. Commonwealth, Ky., 461 S.W. 2D 542 (1971).

(B) It is within the province of the jury to determine what is malicious or without justification.

Whether or not Strunk acted maliciously or without justification is of primary importance in this case, and this pivotal issue is clearly a question of fact to be decided by a jury. Kentucky courts have long followed the rule that the weight of evidence and the credibility of witnesses are matters for the jury to decide, Peterman v. Darby, Ky., 419 S.W. 2d 747 (1967), and that with conflicting evidence before it, the jury is the trier of facts, Webb Transfer Lines, Inc., v. Taylor, Ky., 439 S.W. 2d 88 (1968). In the case before us the fact that Strunk refused to load Stewart's trucks was stipulated by the parties, but whether this act was done maliciously or without justification is a question of fact to be decided by the jury in light of the evidence before it.

(C) There was a conflict in the evidence as to why Strunk refused to allow Stewart to haul from its quarry.

At the time this dispute arose, Mullican was engaged in the

construction of a large industrial plant, shopping for stone at the best price it could obtain. Strunk's bid for stone sold F.O.B. The quarry was not accepted by Mullican, for it was fifteen (15) cents more per ton than the bid of the other local quarry, Somerset Stone. After Somerset Stone was unable to provide further stone and Mullican was forced to purchase from Strunk, Strunk sold stone F.O. B. pursuant to the terms of its bid for at least three (3) days. Thereafter, Strunk refused to sell to Mullican unless Mullican paid sixty(60) cents per ton hauling fee to truckers selected and controlled by Strunk. The economic effect of Strunk's action was to cause Mullican to pay three thousand thirty-six dollar and 39/100 (\$3,036.39) over and above what Mullican would have paid Stewart in the absence of Strunk's actions. These facts are not disputed and no justification was shown for such action by Strunk.

The jury's inference of malice from the surrounding facts and circumstances is a recognized principal in Kentucky. In Davidson v. Commonwealth of Kentucky, Ky., 340 S.W. 2D 243 (1960), the court stated:

“Whether or not a harmful deed if committed with felonious intent or is impelled by malice can be presumed from the nature and result of the thing done. This presumption rests on the principal that a person may be held to intend the necessary consequence of his or her act. A willful or evil purpose may be proved by either direct or circumstantial evidence, or such may be established by the very fact of the wrongful deed itself. However, it is within the province of the jury alone to determine whether the injurious act per-

petrated was accomplished in a criminal manner.’’
(Supra, AT P. 244).

The Court in Combs v. Commonwealth of Kentucky, Ky., 356 S.W. 2D 761 (1962) considered this same issue and held that the question of whether an act was committed maliciously and feloniously is ordinarily one for the jury to determine in the light of all the surrounding facts and circumstances. Evidence that the jury considered and decided the issue of malice or unjustification is shown by the fact that the jury awarded punitive damages to Stewart under Instruction No. 2. Instruction No. 2 told the jury it could award punitive damages ‘‘If you find that the conduct of the defendants, Strunk Construction Company and Hinkle Contracting Corporation, or either of them, was either willful or malicious or indicated outrageous conduct or that they performed in such a way as would indicate a gross neglect or disregard for the rights of James Lee Stewart...’’

This court promulgated the above principal in Ashland Dry Goods Co., v. Wages, 302, Ky. 577; 195 S.W. 2D 312 (1946) when it stated:

‘‘Such damages are proper only when the wrongful act is wanton, malicious or reckless. There must be a showing that they were performed in such a way as would indicate a gross neglect or disregard for the rights of the person wronged.’’ (Supra AT P. 315)

The jury’s finding that Strunk should pay punitive damages shows without question that they believed that Strunk maliciously interfered with the contract existing between

Mullican and Stewart.

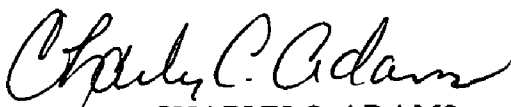
Strunk contends that there should have been a directed verdict in its favor, but the rule is that "a defendant is entitled to a directed verdict only if the evidence and the reasonable inferences which could be drawn therefrom in favor of the plaintiff are insufficient to support a verdict in his favor," Doan v. Griffith, Ky., 402 S.W. 2D 855 (1966). Keeping in mind that the focal issue is whether or not Strunk acted maliciously or without justification, let us look at the only evidence in dispute. Strunk sought to justify its action by introducing testimony that it acted to preserve order and efficient operation of its quarry. Stewart, however, produced evidence that Strunk refused to load his trucks in order that the trucks under the control of Strunk would haul the stone, and that having those truckers at its quarry conferred a business advantage upon Strunk. The court in Lee v. Tucker, Ky., 365 S.W. 2D 849 (1963) held that if reasonable men may differ on the conclusion to be drawn from all evidence on both sides, the question should be one for the jury; otherwise, a clear conclusion is a matter of law.

Obviously, there was a question of fact for the jury ... what motivated Strunk to act as it did. The jury refused to accept Strunk's explanation and accepted the reasoning advanced by Stewart. The court properly refused to direct a verdict or render judgment notwithstanding the verdict.

CONCLUSION

The evidence shows that Strunk brought about a termination of the contract between Mullican and Stewart. The issue of whether it was maliciously done or was without justification was for the jury to decide. The jury properly found that Strunk had acted without justification and with such disregard of Stewart's rights that punitive damages should be awarded. The parties stipulated that Mullican paid an additional three thousand thirty-six dollars and 39/100 (\$3,036.39) when Stewart was not allowed to haul. In view of the jury's finding, Mullican is entitled to recover its loss from Strunk.

RESPECTFULLY SUBMITTED,



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